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IN THE
Supreme Court of the United States

IN RE TIG SPECIALTY INSURANCE CO.,
Petitioner,

v.

UNITED STATES DISTRICT COURT,
DISTRICT OF OREGON,
Respondent,

THE REGENCE GROUP, REGENCE BLUESHIELD, REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUESHIELD OF IDAHO, AND REGENCE BLUECROSS BLUESHIELD OF UTAH,
Real Parties in Interest.

On Petition for a Writ of Certiorari and/or Mandamus to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI AND/OR MANDAMUS

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QUESTION PRESENTED

Whether the protections of the work-product doctrine are waived, *Hickman* v. *Taylor*, 329 U.S. 495 (1947), when a defendant insurer shares such materials with a reinsurer with which it has a substantial but not perfect alignment of interests.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption.

TIG Specialty Insurance Company was until 2008 a wholly-owned subsidiary of Fairfax Financial Holdings, Ltd. No parent corporation or publicly held company owns 10 percent or more of the stock of Fairfax Financial Holdings, Ltd.

TIG Specialty Insurance Company now is known as Ironshore Specialty Insurance Company. Ironshore Specialty Insurance Company is a wholly-owned subsidiary of Ironshore, Inc. No parent corporation or publicly held company owns 10 percent or more of the stock of Ironshore, Inc.

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PETITION FOR A WRIT OF CERTIORARI AND/OR MANDAMUS

TIG Specialty Insurance Company (TIG) respectfully petitions for a writ of certiorari and/or mandamus to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

On May 1, 2009, the United States District Court for the District of Oregon denied TIG's motion for a protective order. That order is unreported, and is reproduced in the Petition Appendix (Pet. App.) at 20a-25a. Subsequent related orders are reproduced at Pet. App. 2a-6a and 7a-19a. The order of the Ninth Circuit denying TIG's petition for a writ of mandamus is unreported, and is reproduced at Pet. App. 1a. That Court's further order denying reconsideration, panel rehearing, or rehearing en banc is reproduced at Pet. App. 26a.

JURISDICTION

The court of appeals entered judgment on May 21, 2010. Pet. App. 1a. A timely petition for reconsideration, rehearing, or rehearing en banc was denied on July 2, 2010. Pet. App. 26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 26(b)(3) provides in pertinent part as follows:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litiga-

tion or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

INTRODUCTION

The lower court's decision strikes at the heart of the insurance and reinsurance industries. Insurers and their reinsurers rely on the expectation and reality of a frank exchange of information concerning underlying insurance risks and claims to ensure the efficient operation of this multi-hundred-billion dollar industry. Severely upsetting that flow of information, the lower court held that TIG waived its attorney work-product protection—and that the "common interest doctrine" was inapplicable—when it shared work product with its reinsurers in the course of business and in two confidential arbitrations. The district court therefore authorized the party insured by TIG (and whose insurance risk was reinsured by TIG's reinsurers) to discover those materials in a coverage dispute with TIG. The court's decision will adversely

affect the exchange of information between insurer and reinsurer, causing repercussions throughout the insurance industry and disrupting an efficient system of insurance risk spreading that has operated successfully for centuries, to the benefit of the public as a whole.

The lower court's holding—that the protections of the work-product doctrine are waived when an insurer provides documents to its reinsurers with which it shares common but not identical interests—adopts a distinctly minority position. In the specific context of insurer/reinsurer communications, a majority of lower courts correctly recognizes that insurers and reinsurers generally possess a sufficiently common interest that exchanging information between them does not waive the protections of the work-product doctrine. Additionally, the decision below conflicts with the great weight of authority from the courts of appeals. These courts recognize that the work-product doctrine is not vitiated when entities have similar interests and there is "a legitimate, nonadversarial, interest in reviewing ... attorneys' work product." *E.g.*, *United States* v. *Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985). TIG and its reinsurers shared just such an interest here. The lower court's reasoning—that TIG and its reinsurers' common interest was vitiated by the bare fact of their disagreement about how to apportion ultimate liability (if any) on Regence's claim—would erase the common-interest doctrine for numerous classes of joint defendants, who commonly share a fundamental interest in contesting liability at all but are antagonistic over the apportionment of liability between them.

The decision below thus threatens to prevent insurers and reinsurers from obtaining and jointly benefiting from important claims information. The result

will be to strain the insurer-reinsurer relationship, and to drive up the cost of reinsurance, and inevitably insurance as well, to compensate for the increase in risk that inevitably comes with decreased information. The decision below also has implications for every owner of an insurance policy, because the relationship between an insured and its insurer is similar in relevant respect—namely, that a party in litigation needs to share information about that litigation with its indemnitor.

The court's decision also will have a particularly adverse effect on the insurance and reinsurance industries' use of arbitration, which long has been the critical means for resolving disputes between insurers and reinsurers. The court concluded that, merely by engaging in arbitration with its reinsurers, TIG waived the protections of the work-product doctrine over documents shared even prior to the arbitration. This sweeping conclusion will dissuade insurers and reinsurers from engaging in arbitration, contrary to the strong federal preference for that means of dispute resolution.

For all of these reasons, the Court should grant the petition.

STATEMENT OF THE CASE

This appeal turns on the interplay between the work-product doctrine and the insurance and reinsurance industries. To understand the profound error committed by the district court, it is important briefly to explain reinsurance, as well as the fundamental protection of the work-product doctrine in federal litigation.

I. THE REINSURANCE INDUSTRY.

Reinsurance is akin to insurance for insurance companies. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 772-73 (1993); 1A Steven Plitt et al., *Couch on Insurance* § 9:1 (3rd ed. 2010) (hereinafter, "*Couch*"). Through a reinsurance contract, the "reinsurer agrees to indemnify a primary insurer"—also known as the "cedent"—"for losses it pays to its policyholders." *In re Midland Ins. Co.*, 590 N.E.2d 1186, 1188 (N.Y. 1992); see also 1A *Couch* §§ 9:1, 9:2. In exchange for agreeing to indemnify the insurer, the reinsurer receives a portion of the insurance premium. 1A *Couch* § 9:1; *Colonial Am. Life Ins. Co.* v. *Comm'r*, 491 U.S. 244, 247 (1989). In short, a policyholder/insured buys insurance from an insurer, which then "cedes" some of that risk to one or more reinsurers.[1] Reinsurance that applies to an individual policy is known as a "facultative" reinsurance contract; reinsurance that applies to an entire book of the insurer's business is known as a reinsurance "treaty." 1A *Couch* § 9:3; *Unigard Sec. Ins. Co.* v. *N. River Ins. Co.*, 4 F.3d 1049, 1053-54 (2d Cir. 1993). This case involves reinsurance treaties.

"Reinsurance has been in existence for centuries," 1A *Couch* § 9:1, and is critical to the insurance industry. It allows insurers "to diversify the risk of loss, and to reduce required capital reserves." *Unigard Sec.*, 4 F.3d at 1053 (citation omitted); *Excess & Cas. Reins. Ass'n* v. *Ins. Comm'r*, 656 F.2d 491, 492 (9th Cir. 1981); see also *Hartford*, 509 U.S. at 773. By

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[1] For example, a company X might purchase a $25 million insurance policy from insurer A. A then "cedes" $20 million of that risk to reinsurers B, C, D and E. Only A remains potentially directly liable to X for the entire $25 million, but A has successfully spread the risk equally among itself and the four other companies.

spreading risk in this fashion, reinsurance "minimize[s] [insurers'] exposure to catastrophic loss," providing stability to the insurance market. *In re Midland*, 590 N.E.2d at 1188; *Unigard Sec.*, 4 F.3d at 1053. In addition, by reducing the reserves that insurers are required to maintain, reinsurance allows insurers to underwrite more policies, including to those who might otherwise be uninsurable. *Unigard Sec.*, 4 F.3d at 1053; *Excess & Cas.*, 656 F.2d at 492; *Owens* v. *Aetna Life & Cas. Co.*, 654 F.2d 218, 241 (3d Cir. 1981). By enabling more policies to be written, especially among smaller companies, reinsurance also fosters more effective competition. *Fontenot* v. *Marquette Cas. Co.*, 247 So. 2d 572, 576 (La. 1971).

Critically important here, a reinsurer has no direct relationship with the original insured, see *Colonial*, 491 U.S. at 247; *Excess & Cas.*, 656 F.2d at 492, and a reinsurer's obligation is solely to indemnify the insurer, *Unigard Sec. Ins. Co.* v. *N. River Ins. Co.*, 594 N.E.2d 571, 574 (N.Y. 1982); see also *id.* ("A reinsurance contract .... confers no rights on the insured."). It is the insurer that has the contractual relationship with the insured; it issues the insurance policy to the insured, and it investigates and manages claims. The sequencing of these relationships—insured to insurer, then insurer to reinsurer—has important consequences.

First, the reinsurer is in important respects wholly dependent on the insurer. The reinsurer must depend on the insurer for information about the policy and claims made under it because the reinsurer has no ability to demand information about risk from the insured—with which, after all, it has no direct relationship. Here, for instance—as is common in reinsurance treaties—the reinsurance treaties between TIG and its reinsurers provided that the reinsurers

would have access to TIG's files pertaining to the policies being reinsured. Ninth Circuit Petition Appendix (CA9 App.) 258 p.4-5. In addition, the economics of the business can only work if the reinsurers can rely upon the insurer to do the claims handling on a policy, rather than each reinsurer duplicating this same effort.

Given reinsurers' dependence on insurers, the relationship between them is "often characterized as one of 'utmost good faith.'" *Unigard Sec.*, 4 F.3d at 1054; *Unigard Sec.*, 594 N.E.2d at 574; 1A *Couch* § 9:17. Reinsurers rely on insurers for prompt and full disclosure of information respecting the risks that have been reinsured, and insurers have a duty of utmost good faith to disclose this information. *Unigard Sec.*, 4 F.3d at 1054; 1A *Couch* § 9:17. "This utmost good faith may be viewed as a legal rule but also as a tradition honored by ceding insurers and reinsurers in their ongoing commercial relationships." *Unigard Sec.*, 4 F.3d at 1054.

Second, for these same reasons, "the interests of a reinsurer and the ceding primary insurer with respect to a pending claim are generally identical." *Unigard Sec.*, 594 N.E.2d at 574. Although a dispute can arise between the insurer and the reinsurer themselves about ultimate responsibility for satisfying a claim, the two have the same interest vis-à-vis the claimant/insured. Given this close and ongoing relationship between reinsurer and insurer, arbitration is critical to resolving disputes that arise between them. 1A *Couch* § 9:34; Reins. Ass'n of Am., *Manual for the Resolution of Reinsurance Disputes* (*Reinsurance Manual*) 8 (2009). "This is explained, in part, by the need for the two parties to maintain a functional business relationship with each other after the dispute has been settled." 1A *Couch* § 9:34.

II. THE WORK-PRODUCT DOCTRINE.

The work-product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States* v. *Nobles*, 422 U.S. 225, 238 (1975). This Court first recognized the work-product doctrine in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The Court found it "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Permitting an adversary to discover an attorney's work product would mean that an "attorney's thoughts, heretofore inviolate, would not be his own," a result that would have a "demoralizing" "effect on the legal profession." *Id.* at 511. Protecting an attorney's work product from disclosure to an adversary is "essential to an orderly working of our system of legal procedure," and a party seeking such material has a heavy "burden ... to establish adequate reasons to justify production." *Id.* at 512.

Federal Rule of Civil Procedure 26(b)(3) codifies the doctrine. It protects from disclosure "documents and tangible things" prepared by counsel in anticipation of litigation. Fed. R. Civ. P. 26(b)(3)(A) (capitalization omitted). These materials may be discovered only after a showing of need and undue hardship. *Id.* 26(b)(3)(A)(i)-(ii). And even then, courts must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." *Id.* 26(b)(3)(B). "Like other qualified privileges," work-product protection "may be waived," *Nobles*, 422 U.S. at 239, including through voluntary disclosure. See, *e.g.*, *United States* v. *Deloitte LLP*, 610 F.3d 129, 139 (D.C. Cir. 2010). But, not all voluntary disclosures result in waiver; disclosing protected materials to one who shares a "common inter-

est" does not waive the protection as against others who share no such interest. See, *e.g.*, *id.* at 141-42.

III. PROCEDURAL BACKGROUND.

A. The present dispute arises from a lawsuit filed by five BlueCross entities (collectively, "Regence"[2]) against TIG in October 2007. CA9 App. 1-15. Regence sought coverage from TIG, under an insurance policy Regence purchased from TIG, for expenditures that Regence incurred in settling underlying litigation accusing Regence of participating in a RICO conspiracy to underpay medical providers. Pet. App. 8a.

1. During discovery, Regence requested documents from TIG related to the reinsurance that applied to Regence's policy. CA9 App. 145. TIG has treaty reinsurance, see *supra* at 5, which covers many policies, including the one issued to Regence. These include separate reinsurance treaties with, among others, Munich Reinsurance America, Inc. (Munich Re) and Swiss Reinsurance America Corporation (Swiss Re). See, *e.g.*, CA9 App. 162, 198-99. Over the course of their relationship, TIG and the reinsurers had shared privileged and confidential materials regarding claims presented under TIG's underlying policies, including attorney work product analyzing the Regence policy and the claim arising from the medical providers' RICO lawsuit against Regence. *Id.* at 65, 164, 199. TIG and its reinsurers shared this information confidentially and with the intent that it remain so. *Id.*

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[2] The plaintiffs/real parties in interest are The Regence Group, Regence BlueShield, Regence BlueCross BlueShield of Oregon, Regence BlueShield of Idaho, and Regence BlueCross BlueShield of Utah.

TIG and the reinsurers also shared certain privileged materials in connection with two arbitrations. CA9 App. 164, 199. During the course of TIG's relationship with Munich Re and Swiss Re, questions arose concerning the scope of the reinsurers' obligations under the reinsurance treaties. These disputes involved a large number of TIG policies, including the policy issued to Regence. *Id.* at 164-65, 199. TIG arbitrated these disputes with Munich Re and Swiss Re, pursuant to an arbitration clause in the treaties. *Id.* As part of these proceedings, TIG was ordered to share privileged materials under a strict confidentiality agreement. *Id.* at 164-65, 199-200, 251, 259 p.1, 260 p.1, 261 p.1-2. These materials included attorney work product, prepared by TIG's coverage defense counsel in the Regence matter, that related to the Regence policy and lawsuit, including the opinions of those attorneys. *Id.* at 164, 258, 260 p.1. At least one of the arbitration orders directing production of these materials was based expressly on a finding that TIG and its reinsurer shared a common interest, *id.* at 259 p.1, and the arbitration panels issued protective orders to ensure that the materials remained confidential, *id.* at 259 p.1, 260 p.1, 261 p.1-3.

Because many of the reinsurance documents requested by Regence from TIG are privileged and confidential, TIG objected to Regence's discovery request, asserting among other objections that the documents are protected under the work-product doctrine. CA9 App. 145. Regence then issued subpoenas directly to TIG's reinsurers, seeking protected documents related to the Regence policy and the three underlying RICO lawsuits against Regence. *Id.*; Pet. App. 20a, 22a. Regence sought documents exchanged by TIG and its reinsurers during the normal course of the reinsurance relationship, and also documents ex-

changed in the course of the arbitrations. Pet App. 22a.

2. TIG and the reinsurers all sought a protective order from the district court. Pet. App. 20a, 23a. They argued that their exchange of privileged materials concerning Regence did not waive the work-product doctrine because at all times they shared a common interest vis-à-vis Regence, i.e., that Regence not recover for claims that were not within the ambit of the TIG policy. CA9 App. 67-68.

The district court denied the motions. Pet. App. 24a. It concluded that TIG had waived any protection by disclosing the documents to its reinsurers. *Id.* The court reasoned that "an insurance company can be construed as waiving any privilege if it has shared its counsel's documents with a reinsurer when the parties' interests are not aligned." *Id.* at 23a-24a. Here, it concluded, the "relevant parties' interests ... were not and are not aligned." *Id.* at 24a. In support of this conclusion, the court pointed only to the fact that TIG had "engaged in two contested arbitrations with the reinsurers." *Id.*

3. TIG sought reconsideration, which also was denied. Pet. App. 9a-12a, 18a-19a. The court reaffirmed that "if documents at issue here ever were privileged, [TIG] expressly or impliedly waived that privilege." *Id.* at 10a. The court further clarified that discovery would include even materials that TIG had shared with its reinsurers before any question arose about the scope of reinsurance obligations: "The scope of this discovery is not restricted to temporal limitations pertaining to when disputes arose between defendant and the reinsurers, or when those disputes were settled"; it "includes all documents related to the policy at issue." *Id.* at 11a. Simply put, the district court's "earlier Order approved—without

reservation—Regence's requests for discovery." *Id.* The district court also denied TIG's request to certify this issue for interlocutory appeal. Pet. App. 12a.

B. TIG petitioned the Ninth Circuit for a writ of mandamus. TIG argued that, whatever disagreement it may have had with its reinsurers respecting the scope of the reinsurance treaties, it always shared a fundamental common interest with the reinsurers as against Regence—namely, ensuring that Regence's recovery, if any, was appropriately limited to the terms of its insurance policy. An array of amici filed briefs in support of TIG's mandamus petition, which highlighted the disruptive effect of the district court's order across the insurance and reinsurance industries. These amici represented the full spectrum of parties involved in reinsurance transactions and disputes: reinsurers, insurers, and attorneys.[3] They explained the pernicious effect that the district court's decision would have on the insurance and reinsurance industries and the insurance-buying public—it will discourage the free flow of information upon which those industries depend in order to accept and spread risk. They further explained that this ruling would discourage arbitration of reinsurance disputes. The panel denied the petition in a perfunctory order. Pet. App. 1a.

Given the importance of the issue, as demonstrated by TIG and its supporting amici, TIG requested that the case be referred to a merits panel for briefing and argument, and in the alternative sought rehearing or

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[3] Amicus briefs were submitted by the Complex Insurance Claims Litigation Association (CICLA); the Reinsurance Association of America (RAA) and the Property Casualty Insurance Association of America (PCIA); Great American Insurance Companies; and the Federation of Defense and Corporate Counsel (FDCC).

rehearing en banc. The panel denied this modest request as well, ordering instead that "[n]o further filings shall be accepted." Pet. App. 26a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the important question whether the work-product doctrine is vitiated when an insurer provides work-product information to a reinsurer with which it shares fundamentally common but not identical interests. The decision below adopts the minority position in an existing division among authorities that address this question in the specific context of reinsurance. More broadly, that rule conflicts with the great weight of authority from the courts of appeals respecting what qualifies as a "common" interest. Multiple courts of appeals have properly rejected a rule that interests are common only if they are near-identical; such a standard rarely could be satisfied, even by co-parties in litigation, and has little to do with the purposes served by the work-product doctrine.

If left unrepaired, the decision below will have severe consequences throughout the insurance industry and the world of risk-sharing. As a practical matter, it will prevent the free flow of information between insurers and reinsurers, driving up the cost of reinsurance and limiting the industry's ability to spread risk. Insurers faced with the prospect of being held to have waived privilege vis-à-vis their policyholders if they disclose claims information to their reinsurers will respond by withholding such information from reinsurers. Reinsurers will respond by denying liability in cases of uncertainty. When insurers then institute arbitration to establish the reinsurers' liability, they then will run the risk of the arbitrators ordering disclosure of the claim information, and an

insurer's compliance with such an order will waive privilege under the decision below. Thus, the decision places the insurer in an untenable position, having to choose between its right and obligation to scrutinize claims with the assistance of counsel and the ability to collect its reinsurance. In addition, reinsurers will need to increase their own staff and expenses to duplicate the claims analysis performed by insurers. For all of these reasons, the Court should grant the petition.

I. THE DECISION BELOW DEEPENS A DIVISION OF AUTHORITY CONCERNING THE COMMON-INTEREST DOCTRINE BETWEEN INSURERS AND REINSURERS.

A. The decision below joins a minority of one other court in holding that an insurer and reinsurer must have a near-perfect alignment of interests in order to invoke the common-interest doctrine. The better rule, and the one recognized by most courts to have considered the question, is that insurers and reinsurers generally share a sufficiently common interest so that sharing information between them does not vitiate the protection of the work-product doctrine.

The court below held that TIG waived applicable privileges when it provided information on the Regence claim to its reinsurers, on the theory that the interests of TIG and its reinsurers "were not and are not aligned." Pet. App. 24a. This was because, the court reasoned, TIG "engaged in two contested arbitrations with the reinsurers." *Id.* The court undertook no analysis of what issues were presented in the arbitrations; whether those issues were related to or separate from the issues in the litigation between TIG and Regence; nor, more fundamentally, whether TIG and its reinsurers shared any common interest

against Regence. In short, the decision below holds categorically that the bare fact of the arbitrations means that the parties' interests are "not aligned," and should be treated as such from the inception of Regence's claim. See also *id.* at 23a-24a (relying on *AIU Insurance Co.* v. *TIG Insurance Co.*, which holds that insurers and reinsurers had no common interest where "litigation between the parties was clearly a possibility," No. 07 Civ. 7052, 2008 WL 5062030, at *7 (S.D.N.Y. Nov. 25, 2008)).

The decision below joins one other court in so radically limiting the common-interest doctrine where insurers and reinsurers are concerned. In *McLean* v. *Continental Casualty Co.*, the court ruled that a defendant insurer's production of documents to its reinsurer "waived any privilege that may have been applicable." No. 95 CIV. 10415, 1996 WL 684209, at *1 (S.D.N.Y. Nov. 25, 1996). In reaching this conclusion, the court adopted the reasoning of *North River Insurance Co.* v. *Columbia Casualty Co.*, which, in addressing waiver of the attorney-client privilege, required that, for the common-interest doctrine to apply, "'the nature of the interest [must] be identical, not similar,'" and concluded that the relationship between insurer and reinsurer failed to meet this test. No. 90 Civ. 2518 (MJL), 1995 WL 5792, at *3, *5 (S.D.N.Y. Jan. 5, 1995).[4]

In conflict with these decisions, a majority of courts properly recognizes that if the interests of an insurer and reinsurer are not perfectly aligned, this fact does not destroy the work-product protection created by their larger common interest.

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[4] *North River* itself arose under New York state law. *See* 1995 WL 5792, at *2, *5.

For example, in *Minnesota School Boards Ass'n Insurance Trust* v. *Employers Insurance Co.*, the court concluded that an insurer and its reinsurer shared a sufficiently common interest that the insurer retained work-product protection for documents provided to reinsurers and then sought by an adversary in an insurance coverage suit. 183 F.R.D. 627 (N.D. Ill. 1999) (Levin, M.J.). In the course of granting the insurer's motion to quash subpoenas, the court agreed with the insurer's explanation that it shared with its reinsurers a "common interest in evaluating and minimizing the exposure arising from" the coverage suit, and that an "expectation of confidentiality" accompanied the disclosure. *Id.* at 631. The court therefore held that the sharing of protected information between the insurer and reinsurer was covered by a common interest: the insurer "intended and expected that communications would remain confidential and protected from common adversaries such as" the insured. *Id.* at 632.

To similar effect is the decision in *City of Sterling Heights* v. *United Nat'l Ins. Co.*, No. 03-72773, 2005 WL 5955828, at *1 (E.D. Mich. June 30, 2005). There, the court denied a plaintiff's motion to compel production of records disclosed to reinsurers, holding that an insurer's sharing of "documents with its reinsurers does not change" the privileged nature of those documents. *Id.* This was because, the court reasoned, "[t]he presence of a third party who is an agent of the client will not destroy the ... privilege." *Id.* (internal quotation marks omitted); cf. also *Unigard Sec.*, 594 N.E.2d at 574 ("the interests of a reinsurer and the ceding primary insurer with respect to a pending claim are generally identical").

This same basic principle—that an insurer and reinsurer need not be perfectly aligned in their inter-

ests—has been articulated and applied in cases arising under slightly different circumstances as well. In *Employer Reinsurance Corp.* v. *Laurier Indemnity Co.*, the plaintiff was a reinsurance company, which had sued for a declaration of its rights and liabilities under a reinsurance contract. It sought documents that had been shared between the defendant-insurer and a third-party reinsurer that "pertain[ed] to strategies regarding this lawsuit." No. 8:03-CV-1650T26-MSS, 2006 WL 532113, at *1 (M.D. Fla. Mar. 3, 2006). The court denied the request, holding that the documents were protected work product and that there was no waiver of the privilege because the non-party reinsurer and the defendant-insurer shared a common interest as against this adversary. *Id.* at *2.

Also analogous is *United States Fire Insurance Co.* v. *General Reinsurance Corp.*, which concerned a lawsuit between two companies that had written excess insurance policies. No. 88 CIV. 6457 (JFK), 1989 WL 82415 (S.D.N.Y. July 20, 1989). One of these direct insurers sought to compel the other to produce a privileged memorandum that it had given to its reinsurer and reinsurance broker/intermediary, which rendered an opinion on the merits of this lawsuit between the two excess insurers. *Id.* at *1, *3. The court denied the motion to compel, reasoning that

> [t]here can be little doubt that U.S. Fire's reinsurers and the broker/intermediary which served as a conduit between U.S. Fire and its reinsurers were and remain in a community of interest regarding this lawsuit. As such, shared communications among these entities retain their privileged status under the work product doctrine.

Id. at *3; see also *Great Am. Surplus Lines Ins. Co.* v. *Ace Oil Co.*, 120 F.R.D. 533, 534-35, 538 (E.D. Cal. 1988) (granting a protective order respecting docu-

ments that a non-party reinsurer had produced in response to a subpoena from the defendants in the case).

B. Certiorari is also warranted because the decision below departs so radically from basic principles, established in multiple decisions of federal courts of appeals, concerning the proper scope of the work-product doctrine. See generally *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978) (granting certiorari to address a conflict between a court of appeals and a district court); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477 & n.3 (1981) (conflict between state courts and two district court decisions); *United States* v. *Constantine*, 296 U.S. 287, 290 (1935).

At least three federal courts of appeals—the Fourth and District of Columbia Circuits, as well as the Temporary Emergency Court of Appeals—have rejected the view that parties must be perfectly aligned in order to safely share work-product-protected materials within the scope of a shared common interest. See *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (district court erred in holding that doctrine "is limited to codefendants"); *Gulf Oil Corp.*, 760 F.2d 292; *United States* v. *AT&T*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980).

The seminal case, which demonstrates just how far the district court went wrong here, is *United States* v. *AT&T*. Both MCI and the United States government had been pursuing separate antitrust suits in separate courts against AT&T. 642 F.2d at 1288-89. Not only were their lawsuits separate, but they also had not entered into any joint representation agreement; they simply shared common objectives in pursing AT&T. MCI shared with the United States materials that MCI prepared in the course of its own litigation,

including materials that were protected work product. *Id.* AT&T sought to discover those materials, and the D.C. Circuit reversed a district court order requiring disclosure. *Id.* at 1296-300.

In so doing, the court of appeals articulated a test for sharing work product radically at odds with the decision below. It held that the common-interest doctrine covers, for instance, "parties 'having a mutual interest in litigation'"; "attorneys representing parties 'sharing such a common interest in litigation, actual or prospective'"; and even, of particular relevance here, "parties ... whose interest[ ] in prospective litigation may turn on the success of the other party in a separate litigation." *Id.* at 1298; see also *Gulf Oil*, 760 F.2d at 296 (upholding application of the common-interest doctrine where the parties have "a legitimate, nonadversarial, interest in reviewing ... attorneys' work product"); *In re Grand Jury Subpoenas*, 902 F.2d at 249 (protecting materials disclosed between a party and non-party to a lawsuit when the non-party was essentially a "real party in interest" because "[r]ecovery would inure to it").

In order to retain work-product protection, the transferor and transferee parties need not have perfectly aligned interests. Rather, it is enough that the disclosure is not "'inconsistent with the maintenance of secrecy from the disclosing party's adversary.'" *Deloitte LLP*, 610 F.3d at 140; *AT&T*, 642 F.2d at 1299 (considering whether "the transferee is ... likely to disclose the work product material to the adversary"). And when (as here) "the transfer ... is conducted under a guarantee of confidentiality, the case against waiver is even stronger." *AT&T*, 642 F.2d at 1299-300.

Such protection is appropriate because "the work product privilege does not exist to protect a confiden-

tial relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *AT&T*, 642 F.2d at 1299 (emphases omitted); see *In re Foster*, 188 F.3d 1259, 1272 (10th Cir. 1999) (noting "society's interest in protecting the adversary system by shielding litigants' work-product from their opponents, and thus freeing lawyers to create such material without fear of discovery and exploitation"); *In re Grand Jury Subpoenas*, 902 F.2d at 249-50.

This rule makes sense, and indeed the contrary standard announced by the district court could not be met in an array of situations in which work-product protection obviously should apply. The district court concluded that the interests of TIG and its reinsurers "are not aligned" because they had engaged in "two contested arbitrations." Pet. App. 24a. But, any adversity between TIG and the reinsurers concerning which of them would be responsible for any eventual liability to Regence is no different than the potential adversity that typically exists among joint defendants. Co-defendants share a fundamental common interest in contesting liability against the plaintiffs, notwithstanding that they may disagree over the proper apportionment of damages. But that form of adversity among co-parties does not vitiate work-product protection as against the opposing party.[5]

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[5] Indeed, even the courts of appeals that have adopted a narrower formulation of the common-interest test have only required an overlap in interests akin to that of "co-parties." *E.g.*, *Frontier Ref. Inc.* v. *Gorman-Rupp Co.*, 136 F.3d 695, 705 (10th Cir. 1998); *United States* v. *MIT*, 129 F.3d 681, 687 (1st Cir. 1997) ("The disclosures did not take place in the context of a joint litigation where the parties shared a common legal interest."). The case here would meet that test, for the reasons just

The same is true of the relationship between any garden-variety defendant and its insurance company, even outside of the specific context of reinsurance. The proper question is not whether there is some small amount of daylight between these entities' interests, but rather whether the reinsurers had "a legitimate, nonadversarial, interest in reviewing [TIG's] attorneys' work product," *Gulf Oil*, 760 F.2d at 296, which surely they did. There has been no argument, nor could there be, that TIG's reinsurers were "likely to disclose the work product material" to Regence. *AT&T*, 642 F.2d at 1299. It is self-evident that, in the dispute between Regence and TIG, the reinsurers were and are squarely on TIG's side.

II. REVIEW IS WARRANTED BECAUSE OF THE HARMFUL EFFECT OF THE DECISION BELOW ON THE INSURANCE AND REINSURANCE INDUSTRIES.

If left undisturbed, the decision below could have a highly disruptive effect on the insurance and reinsurance industries, and their reliance on arbitration to resolve disputes. Multiple commentators already have confirmed the consequences of the lower court's orders. See, *e.g.*, Robert A. Kole & Mark A. Bross, *A Threat To Cedent/Reinsurer Communications*, Law360 (May 7, 2010)[6]; William K. Enger, *Oregon Court Allows Discovery of Confidential Reinsurance Reports in Bad Faith Litigation: The Regence Group v. TIG Specialty Insurance Co.*, martindale.com Legal

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noted, but not the exceptionally stringent formulation of the court below.

[6] *At* http:///www.law360.com/articles/166369 (hereinafter "*Kole & Bross*").

Library (Apr. 26, 2010)[7]; Jennifer R. Devery et al., *Oregon District Court Rules That Sharing of Privileged Documents with Reinsurers Waives Protections Afforded by Attorney-Client Privilege and Work Product Doctrine*, Crowell & Moring Reinsurance Law Alert (Mar. 4, 2010).[8]

First and foremost, the lower court's ruling strikes directly at the information-sharing that is critical to the relationship between insurers and reinsurers:

> By the very nature of reinsurance, reinsurers generally are at an informational disadvantage in seeking to evaluate a complex claim.
>
> Often, the advice and analysis obtained from cedent's coverage counsel is among the best sources of information explaining the cedent's position. Yet, cedents faced with the Regence v. TIG decision may determine that the risk of providing privileged or confidential information is too great, which will affect a reinsurer's ability to comprehensively and cost effectively evaluate complex claims.

Kole & Bross, supra.

In short, after the decision below, the specter of a privilege waiver hangs over the routine information-sharing on which the industry depends. Discouraging insurers from sharing such information will cause significant disruptions. Insurers will be forced to withhold pertinent claims information from reinsurers. The reinsurers, who are dependent on such in-

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[7] *At* http://www.martindale.com/litigation-law/article_Wilson-Elser-Moskowitz-Edelman-Dicker_994042.htm (hereinafter "*Enger*").

[8] *At* http://www.crowell.com/NewsEvents/News-letter.aspx?id=1476 (hereinafter "*Devery*").

formation, will be unable to assess and reserve for their own exposure unless they seek to duplicate the insurer's claims function. Reinsurance premiums necessarily would increase as reinsurers were forced to undertake claims investigation—as best as they are able. (As noted above, the reinsurer has no ability to require the insured to provide claims information.) And, reinsurers will face greater risk resulting from the decreased information flow. As reinsurance premiums rise, so too would insurance premiums and business costs.

In addition, still greater risk will arise because of lingering uncertainty over coverage obligations. If the bare fact of an arbitration between an insurer and reinsurer destroys common interest, thereby preventing insurers from sharing key information with reinsurers, then the resolution of any dispute with a reinsurer may have to await resolution of the underlying liabilities that have been reinsured. This will be disastrous in light of the widespread use of treaty reinsurance covering entire books of business. A typical reinsurance treaty can cover thousands of individual policies and underlying claims, and the insurer and reinsurer's dispute may cover only one of those policies or claims. But if that one claim leads to an arbitration, the resulting adversity may prevent the insurer from sharing information with the reinsurer respecting any claim under the reinsured business, thereby jeopardizing its ability to recover from the reinsurer for liabilities across the treaty. An insurer cannot manage this risk by waiting until its coverage disputes with policyholders are resolved before arbitrating with its reinsurers, because it can take decades for all policy liabilities covered by a reinsurance treaty to conclude.

The result will be to lock up capital, and to increase uncertainty and risk. Reinsurers will be able to underwrite fewer reinsurance contracts, and insurers will lose the benefits that flow from spreading risk in this fashion, including lower reserve requirements that permit them to write more policies. See *Unigard Sec.*, 4 F.3d at 1054; *Excess & Cas.*, 656 F.2d at 492; *Owens*, 654 F.2d at 241. In short, the result will harm not only insurers, but also prospective policyholders as well.

The harmful effects of the court's decision are likely to occur even though it "is only one case from one district court." *Kole & Bross*, *supra*. Commentators predict that insurers and reinsurers "likely will be disinclined to ignore [the lower court's] holding," considering "the significant risk of doing so (i.e., waiving [any] privilege and providing ammunition to policyholders and claimants alike," and "the absence of ironclad safeguards that can be erected to prevent a finding of waiver." *Id.*; see *Devery*, *supra* (the ruling "could have far reaching implications with respect to the sharing of information between ceding companies and their reinsurers"); *Enger*, *supra* (describing the ruling's "troubling implications for cedents and their reinsurers").[9]

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[9] Given the importance of the issue and its likely impact across the insurance and reinsurance industries, certiorari is warranted without awaiting further development in the law. This is all the more true after this Court's decision in *Mohawk Industries, Inc.* v. *Carpenter*, 130 S. Ct. 599 (2009), in which the Court held that discovery orders piercing the attorney-client privilege are not immediately appealable under the collateral-order doctrine. Thus, issues such as this one are substantially less likely to reach the courts of appeals or to develop a circuit split. The importance of the issue remains extraordinary and warrants the Court's intervention.

These adverse consequences are compounded by the deterrent effect of the decision below on the use of arbitration. Arbitration "is the industry standard for the resolution of reinsurance disputes," and indeed the insurance and reinsurance industries' use of arbitration dates back to the early nineteenth century. See *Reinsurance Manual, supra* at 8. It is estimated that a remarkable 75-90% of reinsurance disputes are submitted to arbitration. *Id.* at 6 (citing Vincent J. Vitkowsky, *The Reinsurance Wars: A Report from the Front, reprinted in Reinsurance Law, Litigation and Arbitration in the United States: Articles, Papers and Speeches 1983-1991*, at 69, 69 (Buchalter, Nemer, Fields & Younger eds., 1992)). This is the classic context of ongoing business relationships in which private, confidential dispute resolution is both necessary and appropriate, and if a common interest cannot survive in this domain, it cannot survive anywhere.

The decision below disregards the importance of arbitration to these industries, and imposes a substantial disincentive to its continuing use. On the reasoning of the court below, the bare fact that TIG and its reinsurers engaged in arbitration waived the work-product protection that otherwise might exist as to any documents exchanged between them. Pet. App. 24a. Moreover, according to the district court, this waiver covers not just documents exchanged during arbitration, but also applies retroactively to documents exchanged *before* the arbitration began. *Id.* at 10a-11a. In short, an insurer and a reinsurer that have committed to resolve their disputes through arbitration are unlikely to be able to count on the core protections of the work-product protection and the common-interest doctrine.

This rule flies in the face of the strong federal policy encouraging arbitration. For more than 150 years,

this Court has favored arbitration as a mechanism for resolving disputes. *E.g.*, *Burchell* v. *Marsh*, 58 U.S. (17 How.) 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity."). Congress's passage of the Federal Arbitration Act established a "national policy favoring arbitration." *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008); see also *Preston* v. *Ferrer*, 552 U.S. 346, 349 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). The decision of the district court, which treats the bare fact of an arbitration as destroying work-product protection, is flatly contrary to that "national policy."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 30, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: 05/21/2010]

No. 10-70530
D.C. No. 3:07-cv-01337-HA
District of Oregon, Portland

In re: TIG SPECIALTY INSURANCE COMPANY.

TIG SPECIALTY INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
Respondent,

REGENCE GROUP, a.k.a. The Regence Group; et al.,
Real Parties in Interest.

ORDER

Before: LEAVY, RAWLINSON and CALLAHAN, *Circuit Judges*.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All other pending motions are denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Civil No. 07-1337-HA

THE REGENCE GROUP, REGENCE BLUESHIELD, REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUESHIELD OF IDAHO, AND REGENCE BLUECROSS BLUESHIELD OF UTAH,
Plaintiffs,

v.

TIG SPECIALTY INSURANCE COMPANY,
Defendant.

ORDER

HAGGERTY, *District Judge*:

This Order addresses plaintiffs' Motion to Compel Deposition and Document Production of Swiss Reinsurance America Corporation (SRA) [259], and plaintiffs' Motion to Compel the Deposition and Document Production of Munich Reinsurance America (MRA) [262]. The primary obstacle to resolving the discovery requests at the heart of these motions was purported to be the pendency of a Motion to Reconsider and for Clarification advanced by defendant TIG Specialty Insurance Company (TIG, or defendant). The parties should have proceeded to resolve these discovery disputes following that motion's resolution on February 4, 2010. In the absence of any resolution,

the court now issues the following rulings on plaintiffs' motions.

ANALYSIS OF THE MOTIONS

In their briefing, plaintiffs and defendant (and SRA and MRA, the third parties involved in these motions) treat plaintiffs' motions as essentially identical. This court concurs. After considering that briefing, and examining the record, this court also concurs largely with plaintiffs' recitation of the relevant factual background to the motions. To wit: plaintiffs served a deposition subpoena on both SRA and MRA in late October 2009. The subpoena to each party called for the deponent to bring with him or her documents that plaintiffs originally subpoenaed over a year earlier. Neither SRA nor MRA attended the noticed deposition nor moved for affirmative relief.

Counsel are familiar with the protracted nature of the discovery litigation in this matter. Plaintiffs sought discovery from SRA and MRA in September 2008, which prompted these parties and defendant TIG to seek protective orders. That litigation was largely resolved in May 2009, when this court denied the protective order motions. Although TIG continued to disagree with this court's adjudication, and sought reconsideration and clarification, third parties SRA and MRA did not join in TIG's efforts. Instead, these third parties simply refused to cooperate with plaintiffs' subsequent discovery efforts.

This court agrees with plaintiffs' assertions that SRA and MRA maintained an uncooperative, obstructionist posture in resisting those discovery efforts, in an apparent alliance with TIG's efforts to re-visit and re-litigate the failed arguments that were resolved in May 2009.

Plaintiffs' efforts to complete discovery in September 2009 by serving each of these third parties with a deposition subpoena, and to attempt to negotiate resolutions with the parties, is construed by this court as good faith efforts to proceed with prosecuting this action.

Although it appears that the third parties relied upon an alleged uncertainty in the parameters of discovery because of TIG's pending reconsideration motion, the third parties failed to properly challenge plaintiffs' efforts by moving to quash or modify each respective subpoena pursuant to Federal Rule of Civil Procedure 45(c)(3)(A), or by moving for a protective order pursuant to Rule 26(c). Accordingly, SRA and MRA waived any right to object to a deposition subpoena.

In mid-November TIG moved to obtain a protective order regarding "reinsurance discovery." However, neither SRA nor MRA indicated (formally or informally) whether it intended to join in that motion. Moreover, in addition to the third parties' silence after TIG's reconsideration motion was resolved, counsel failed to come forward to resolve plaintiffs' motions after TIG's "reinsurance discovery" motion was denied as moot, and counsel were "urged to cooperate with finalizing appropriate protective orders so that these kinds of motions remain moot." Order of February 4, 2010.

Plaintiffs' motions to compel SRA and MRA are, therefore, well-taken. The motions are granted. This court must also consider whether requiring those third parties to pay reasonable expenses incurred in making the motion, including reasonable attorney fees would be unjust, or whether the lack of cooperation from SRA and MRA was substantially justified.

Fed. R. Civ. P. 37 (a)(4)(A). After considering the entire record, this court concludes that an award of costs and fees is appropriate. Counsel for plaintiffs shall file a proposed Order for the court's signature identifying the costs and fees incurred in litigating the discovery requests from SRA and MRA from September 1, 2009, to the present. This proposed Order, and any supporting brief or documentation, must be filed within eleven days of the date of this Order. Objections from SRA or MRA must be filed within five days of plaintiffs' filing.

The court notes plaintiffs's related request that SRA and MRA be ordered to produce the documents requested of them. The objections maintained against such production have been considered and are without merit. Plaintiffs' counsel remain willing to address confidentiality concerns but, to date, have been met with an unwillingness to cooperate on the part of the third parties' counsel.

CONCLUSION

Plaintiffs' Motion to Compel Deposition and Document Production of Swiss Reinsurance America Corporation [259], and Plaintiffs' Motion to Compel the Deposition and Document Production of Munich Reinsurance America [262], are granted as follows: the third parties SRA and MRA are ordered to produce a witness for deposition and also produce the documents called for in each subpoena. In light of the fact that the deadline for the remainder of discovery has been extended until May 14, 2010, and counsel have been ordered to craft a related proposed protective order by February 26, 2010, the parties involved in these motions are expected to confer and finalize a schedule for all depositions and document production. Counsel shall include in their status report due on or

before March 17, 2010 a summary of the efforts undertaken to comply with this Order.

This court also concludes that plaintiffs are entitled to a partial award of fees and costs. Counsel for plaintiffs shall file a proposed Order for the court's signature identifying the costs and fees incurred in litigating the discovery requests from SRA and MRA from September 1, 2009, to the present.

IT IS SO ORDERED.

Dated this 10 day of February, 2010.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT,
D. OREGON.

Civil No. 07-1337-HA.

THE REGENCE GROUP, REGENCE BLUESHIELD, REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUESHIELD OF IDAHO, AND REGENCE BLUECROSS BLUESHIELD OF UTAH,
Plaintiffs,

v.

TIG SPECIALTY INSURANCE COMPANY,
Defendant.

Feb. 4, 2010.

ORDER

HAGGERTY, *District Judge*.

This Order addresses pending discovery motions, including requests to reconsider the court's denial of a protective order concerning subpoenas to defendant's reinsurers, and requests to appoint a Special Master to resolve the remaining discovery disputes. Most of the pending motions and requests are resolved below. The remainder will be addressed by separate Order.

BACKGROUND

Plaintiffs (also referred to as "Regence") are five corporations headquartered in four different states.

Regence brought this action against TIG Specialty Insurance Company (TIG, or defendant) alleging claims for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, fraud in the inducement, and bad faith. Plaintiffs seek a declaration that defendant is obligated to pay defense and indemnity costs related to three lawsuits. Two of the suits were brought in the Southern District of Florida by physicians and healthcare providers asserting civil claims derived from the Racketeer Influenced and Corrupt Organizations (RICO) Act against Regence and other Blue Cross/Blue Shield entities: *Thomas, et al., v. Blue Cross Blue Shield Assoc., et al.*, Case No. 03-21296 (*Thomas*), and *Solomon et al., v. Blue Cross and Blue Shield Assoc. et al.*, Case No. 03-22935) (*Solomon*). The third suit was filed in Washington Superior Court for Pierce County and involves similar state law claims brought against Regence by Washington physicians: *Tacoma Orthopedic Surgeons, et al., v. Regence Blueshield, et al.*, Case No. 02-2-05982-7 (*Thomas* [sic]).

Regence seeks defense costs and indemnification for a settlement paid in the *Thomas* suit, and defense costs incurred in the *Solomon* and *Tacoma* cases. Defendant paid defense costs in these suits from November 2004 until August 2007. Defendant advances a counterclaim seeking recovery of defense costs paid by defendant after August 20, 2007.

On May 1, 2009, this court denied defendant's motion for a protective order that would have shielded documents relating to positions defendant took with its reinsurers in the ordinary course of business (and during arbitrations) for purposes of ensuring coverage from the reinsurers for Regence's

claims. This court concluded that defendant (and the reinsurer third parties) failed to meet the burden of establishing that specific prejudice or harm would result in the absence of the protective orders requested, and that there had been no threshold showing of appropriate circumstances warranting such protection. Since that ruling, there have been multiple motions filed, arising primarily out of defendant's disagreement with the ruling.

MOTIONS

1. Motion to Reconsider [175]

Defendant moves for reconsideration and clarification of the May 1, 2009 ruling, or certification of issues in that ruling for an interlocutory appeal [175]. After considering defendant's arguments, plaintiffs' responsive briefing, and the record, this court concludes that defendant's motion is denied in part and granted in part for the limited purpose of attempting to provide defense counsel with the requested clarification.

The aspects of the motion that seek an amendment to the prior ruling, or certification for appealing the ruling, are denied. The court has reviewed the authorities defendant now advances in the reconsideration motion. These cases, *Transamerica Computer Co., Inc. v. IBM*, 573 F.2d 646 (9th Cir.1978) (*Transamerica*) and *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.2001) (*Gomez*), fall well short of being "newly discovered evidence" or reflecting an "intervening change in controlling law," and defendant's failure to cite the decisions earlier presents insufficient cause to grant reconsideration now. *Adidas America, Inc. v. Payless Shoesource, Inc.*, 540 F.Supp.2d 1176, 1184 (D.Or.2008).

Moreover, those decisions fail to compel the conclusion defendant seeks—that if a party is compelled to produce documents, there is no waiver of privilege, provided reasonable steps had been taken to protect confidentiality. The *Transamerica* decision addressed the inadvertent production of privileged documents in expedited, complicated discovery proceedings, and whether that inadvertent production should constitute a waiver of applicable privileges in an unrelated case (it does not). 573 F.3d at 648-51. The *Gomez* decision concluded that prisoners who were compelled to store privileged documents in an area in which prison employees accessed the documents had not waived applicable privileges. 255 F.3d at 1133. Plainly, these cases share little in common with the facts presented here. This court's prior conclusion stands—that if documents at issue here ever were privileged, defendant expressly or impliedly waived that privilege.

Defendant's argument regarding the court's interpretation of the decision in *AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052, 2008 WL 5062030 (S.D.N.Y. November 25, 2008) is also unpersuasive. This court acknowledged *AIU's* conclusion "that an insurance company can be construed as waiving any privilege if it has shared its counsel's documents with a reinsurer when the parties' interests are not aligned." Order of May 1, 2009 at 4 (citation omitted). Defendant's subsequent commentary regarding aspects of the *AIU* decision fails to diminish the propriety of this court's reliance upon *AIU* for the general principle stated. Defendant's continued disagreement with this court's conclusion, even coupled with other aspects of the *AIU* decision which defendant construes favorably to its position, is insufficient to warrant reconsideration. Defendant's motion provides no basis for

altering the court's conclusion that the scope of the discovery is reasonable and proper.

Defendant also requests clarification, asking whether the court's ruling extends to documents concerning the underlying litigation exchanged before any dispute arose between defendant and the reinsurers, and whether the ruling include documents exchanged after defendant and the reinsurers settled their disputes. Dft. Mem. Supp. at 8.

To clarify, the court's earlier Order approved—without reservation—Regence's requests for discovery, including:

> 1. The reinsurance policies that defendant purchased covering the Regence policy at issue or underlying litigation that is at issue;
>
> 2. Documents exchanged between defendant and its reinsurers about that underlying litigation;
>
> 3. Documents relating to coverage for the underlying litigation "exchanged with an opposing party or the arbitrators as part of the arbitrations [defendant] had with its reinsurers;"
>
> and
>
> 4. Documents relating to the payments received by defendant from its reinsurers in connection with settlement of claims for coverage for the underlying litigation.

Order of May 1, 2009 at 3 (citation omitted).

The scope of this discovery is not restricted to temporal limitations pertaining to when disputes arose between defendant and the reinsurers, or when those disputes were settled. The scope of discovery includes all documents related to the policy at issue,

and defendant's reinsurance claims for the Regence matters.

Defendant's additional inquiry regarding the confidentiality of certain discovery appears to be tactical. Plaintiffs have demonstrated consistent willingness to abide by confidentiality requests and to agree to reasonable protective orders. Defendant's renewed concerns about confidentiality is no basis for delaying the production of non-privileged discovery or refusing to negotiate appropriate protective orders with opposing counsel in good faith.

Finally, this court rejects defendant's request for certification. Pursuant to 28 U.S.C. § 1291, appellate review is postponed until after a final judgment has been entered by a district court. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b) carves a limited exception to this final judgment rule, allowing a district court to certify an order for interlocutory appeal if: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Ninth Circuit has held that this exception "is to be applied sparingly and only in exceptional circumstances." *United States v. Woodbury*, 263 F.2d 784, 799 n. 11 (9th Cir.1959). It was "not intended merely to provide review of difficult rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir.1966). Interlocutory appeals should be limited to "rare circumstances." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n. 6 (9th Cir.2002). Such "rare circumstances" are absent here.

2. Plaintiffs' Motion [181] and WellPoint's Motion [182] For a Protective Order

The court has scrutinized the movants' protective orders that were proposed in accordance with this court's subsequent instructions, as well as defendant's objections and counter-proposal. The court agrees that the proposals from plaintiffs and WellPoint go beyond the scope presented in this court's Order of May 5, 2009, in which counsel were instructed that "[p]ursuant to the terms of this Order, the Intervenors shall file proposed Protective Orders that limit the scope of defendant's discovery to the parameters offered and described by defense counsel in the Combined Response."

To the extent that those proposals foreclose defendant from seeking additional discovery, waives any requirement for maintaining a privilege log, or mandates that defendant pays the cost of production, those proposals are erroneous. Accordingly, the motions for protective orders from plaintiffs and from WellPoint [181, 182] are denied.

Counsel are ordered to confer again for the purpose of agreeing upon a final appropriate protective order. Preferably, counsel will succeed in submitting a joint proposal. If counsel cannot resolve their differences, each party shall file a proposal. The proposal or proposals must be filed by February 26, 2010.

3. Motions to Compel [192; 196]

Plaintiffs move to compel information relating to reserves [192]. Defendant moves to compel production [196], asserting that plaintiffs continue to delay their discovery obligations.

Defendant's motion was filed prematurely. That motion is denied.

Plaintiffs' motion regarding reserves requires additional analysis. Counsel demonstrated some cooperation regarding this motion, but were unable to reach a resolution. Defense counsel urged the court to deny plaintiff's motion as moot because the parties had agreed to reserve their rights regarding the admissibility of the discovery, defendant already agreed to produce the discovery, and the parties had agreed to treat the discovery as confidential.

Plaintiffs filed supplemental briefing indicating that—although counsel were negotiating—the parties lacked any agreement about the production of information pertaining to defendant's reserves, and plaintiffs preferred that the court hold the motion to compel in abeyance.

Subsequently, plaintiffs reported that defendant had produced sixty-four pages of related discovery, but despite engaging "in a constructive dialogue to try to reach an agreement, the parties continue to disagree about several issues, including the proper scope of [defendant's] production relating to reserves and [defendant's] ability to redact documents relating to reserves." Second Supp. Statement at 2.

Defendant also acknowledged that counsel have differing ideas on the scope and nature of the production of reserve information. Dft's Supp. Statement at 2.

Counsel's efforts at cooperation broke down significantly following these submissions. The court has examined the record and concludes that plaintiffs' motion to compel information about defendant's reserves is well-taken. In light of the indications that defendant has acknowledged that this information is

discoverable, but then has obstructed its production, defendant is ordered to produce all documents relating to reserves established for the underlying actions. This production shall be complete by March 12, 2010. Counsel shall confer and attempt to cooperate with this production as expeditiously as possible. Sanctions will be calculated and assessed against any counsel shown to have caused any further, unwarranted delay in the production or resolution of these discovery matters.

4. Plaintiffs' Motion to Compel and to Strike Defendant's Partial Summary Judgment Motions [230]

In a frank acknowledgment of the frustrations experienced in the prosecution of this litigation, plaintiffs move to compel depositions and to strike pending summary judgment motions advanced by defendant. Plaintiffs also seek an award of attorney fees and costs. This motion is granted in part.

The deposition delays cannot be rationalized. Defendant first suggests that the motion was "premature" because the blizzard of other motions and requests for reconsideration that has been advanced were still under advisement by the court. Defendant hints that rulings in those "pending matters" would assist in determining whether defendant has to cooperate with scheduling depositions.

Defendant's posture regarding its cooperation concerning depositions appears to be that resolution of the other "pending matters" in this litigation was first necessary. The court advises counsel strongly that cooperation and professional conduct is expected at all times, regardless of the number of motions pending or counsel's desires for reconsideration of

past rulings. This court agrees with plaintiffs that in light of the protracted delays and the lack of cooperation exhibited in these matters, striking the motions for partial summary judgment is sound and, ultimately, most efficient. Defendant's Motions for Partial Summary Judgment [43], [46], and [49] are stricken, with leave to renew upon completion of discovery.

However, plaintiffs' requests regarding depositions are denied at this time, with leave to renew. Similarly, plaintiffs' request for an award of fees and costs is denied, with leave to renew, pending the progress counsel achieve in exchanging and resolving discovery.

5. Defendant's Motion for Extensions [238]

Defendant seeks new deadlines for completing discovery and lodging a pretrial order. Plaintiffs object. The court is compelled to grant this motion. A final life schedule is presented below.

6. Defendant's Motion to Refer this Matter to a Special Master [242]

Counsel for defendant cite the numerous disagreements arising during the attempts to acquire discovery as grounds for referring discovery matters in this action to a Special Master. Counsel also refer to the possibility that the conduct of parties may demonstrate that the parties are unable to proceed with discovery, and therefore may establish the propriety of appointing a Special Master.

This motion is denied. Although the court is alerted to the extent to which the conduct of counsel may be contributing to the stalemate in proceeding with discovery in this matter, that conduct presents insufficient grounds to warrant the appointment of a

Special Master to resolve counsel's disputes. Many disputes have been perpetuated by defendant after defendant received unfavorable rulings in certain discovery matters. Appointing a Special Master to "resolve" matters that have been ruled upon would be unfair to the parties, costly, and inefficient. The most efficient approach is to scrutinize counsel's conduct, evaluate the necessity of sanctions where appropriate and impose them, and establish a final schedule in this matter.

7. Defendant's Motion for a Protective Order [245]

Defendant seeks a protective order to reduce the alleged harassment of the reinsurers by plaintiffs until this court rules upon defendant's motion for reconsideration. In light of this court's denial of the motion for reconsideration, this motion is denied as moot. Counsel are urged to cooperate with finalizing appropriate protective orders so that these kinds of motions remain moot.

8. Defendant's Motion to Compel Depositions [251]

Defendant's motion to compel depositions is denied. Plaintiffs' assertions that defendant's "conduct in the days and hours leading up to the fact discovery cut off was designed to create the impression that [defendant] desired deposition discovery, which the record plainly reflects is not the case," appear to be an accurate summary. Pls' Opp. To Mo. To Compel at 5. Counsel are required to cooperate, and conduct themselves professionally for the remainder of this litigation.

9. Defendant's Motion to Stay Discovery Deadlines [254]

Defendant's motion to stay discovery deadlines pending resolution of pending discovery motions is

well-taken. Unavoidable delays in the resolution of those matters have necessitated re-establishing the following final schedule for the discovery in this litigation.

As addressed above, counsel are ordered to confer in hopes of crafting a joint proposed protective order. The joint proposal, or the parties' individual proposals, must be filed by February 26, 2010.

The court notes with approval the resolution achieved by counsel regarding plaintiffs' Motion to Compel Three Categories of Documents [257]. Pursuant to the parties' stipulation regarding that motion, defendant will produce, in part, copies of all defense bills defendant paid relating to the underlying actions, a listing of all defense bills defendant paid, a log of redactions, and documents referenced in defendant's "Claims Manuals" by February 15, 2010. Plaintiffs will advise defendant if counsel are satisfied with this production by March 5, 2010. Counsel will present a status report regarding this discovery to the court on or before March 17, 2010.

In accordance with these efforts, this court extends the deadline for the remainder of discovery until May 14, 2010. Counsel shall include in their status report due on or before March 17, 2010 a summary of all other discovery efforts. Dispositive motions shall be filed thirty days after close of discovery. The pretrial order lodging date will be set by the court after dispositive motions are resolved.

CONCLUSION

Defendant's Motion for Reconsideration and Clarification [175] is denied in part and granted in

part for the limited purpose of providing the requested clarification.

The Motions for Protective Orders from plaintiffs and from WellPoint [181, 182] are denied. Counsel are ordered to confer again for the purpose of agreeing upon a final appropriate protective order. The proposal or proposals must be filed by February 26, 2010.

Plaintiffs' Motion to Compel Information Relating to Reserves [192] is granted as follows: defendant is ordered to produce all documents relating to reserves established for the underlying actions. This production shall be complete by March 12, 2010.

Defendant's Motion to Compel Production [196] is denied.

Plaintiffs' Motion to Compel and to Strike Defendant's Partial Summary Judgment Motions [230] is granted in part. Defendant's Motions for Partial Summary Judgment [43], [46], and [49] are stricken, with leave to renew upon completion of discovery.

Defendant's Motion for Extensions [238] is granted. A final life schedule is presented herein.

Defendant's Motion to Refer this Matter to a Special Master [242] is denied.

Defendant's Motion for a Protective Order [245] is denied.

Defendant's Motion to Compel Depositions [251] is denied.

Defendant's Motion to Stay Discovery Deadlines [254] is granted in part. A final life schedule is presented herein.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 07-1337-HA

THE REGENCE GROUP, REGENCE BLUESHIELD, REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUESHIELD OF IDAHO, AND REGENCE BLUECROSS BLUESHIELD OF UTAH,
Plaintiffs,

v.

TIG SPECIALTY INSURANCE COMPANY,
Defendant.

ORDER

HAGGERTY, *District Judge*:

Defendant has advanced a Motion For a Protective Order Concerning Subpoenas to Defendant's Reinsurers [142]. Third party reinsurers Munich Reinsurance America, Inc., (Munich) [157] and Swiss Reinsurance America Corporation (Swiss) [163], as well as Munich's counsel Rubin Fiorella & Friedman [160] also seek similar protections, and these motions are also resolved by this ruling upon defendant's motion.

STANDARDS

"Federal Rule of Civil Procedure 26(c) states that when a party or other person from whom discovery is sought makes a motion asserting good cause for a protective order, 'the court in which the action is

pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' based on any of several listed reasons." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

The party seeking to limit that access "bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz*, 331 F.3d. at 1130. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Fischer v. City of Portland*, 2003 WL 23537981, at *2 (D. Or. August 22, 2003) (internal quotations omitted).

The court may issue protective orders that protect classes of documents upon a threshold showing of appropriate circumstances warranting such umbrella protection. *Id.* Any such order limiting access for good cause requires that the court's determination "identify and discuss the factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002).

ANALYSIS

Plaintiffs in this action are five corporations with headquarters in four different states and are hereinafter referred to as "Regence." Regence alleges claims for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, fraud in the inducement, and bad faith. This court concludes that Regence's summary of the major issues in this dispute is accurate. These issues include defendant's "conduct and representa-

tions in selling the RICO coverage to Regence, [defendant's] conduct in denying coverage, and [defendant's] contradictory positions about coverage for the Underlying Actions." Pl.'s Opp. at 2.

Defendant seeks by its motion to protect documents relating to positions it took with its reinsurers in the ordinary course of business (and arbitrations) for purposes of ensuring coverage from the reinsurers for Regence's claims. Specifically, pursuant to the prosecution of these claims, Regence seeks discovery that includes:

1. The reinsurance policies that defendant purchased covering the Regence policy at issue or underlying litigation that is at issue;

2. Documents exchanged between defendant and its reinsurers about that underlying litigation;

3. Documents relating to coverage for the underlying litigation "exchanged with an opposing party or the arbitrators as part of the arbitrations [defendant] had with its reinsurers;"

and

4. Documents relating to the payments received by defendant from its reinsurers in connection with settlement of claims for coverage for the underlying litigation.

Pl.'s Opp. at 4.

It is significant to note that "Regence is not seeking reinsurance information that involves claims of other policyholders or [defendant's] privileged material from the arbitrations that was not shared with the arbitrators or the reinsurers." *Id.*

Such discovery, limited in scope as described by Regence, is undoubtedly relevant or likely to lead to admissible evidence regarding Regence's claims for breach of contract or bad faith on the part of defendant. For example, the discovery might lead to evidence that could include admissions, be used for impeachment purposes on the question of whether defendant denied the existence of coverage, or pertain to Regence's fraud claims, motives that might suggest defendant acted in bad faith, and flaws in defendant's asserted defenses.

The question of whether the discovery being sought may fall within the province of the attorney-client privilege or the work product privilege might be closer, but defendant (and the reinsurer parties) failed to show that specific prejudice or harm will result if no protective order is granted. While the attorney-client privilege and the work product privilege provide significant limitations on discovery, such privileges "obscure the search for the truth" and "are both narrowly construed by courts to restrict their impact upon the discovery process." *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 135 (N.D. Ill. 1993) (*Bull Data*) (citation omitted) (reinsurer documents not privileged); *see also Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 257 (W.D. Va. 1999) (the work-product doctrine operates in narrow confines: the anticipation of future litigation must have been the primary motivation which led to the creation of the documents in order to qualify for the privilege; discovery regarding insurer-reinsurer communications not privileged).

Moreover, this court is persuaded by a recent decision that concluded that an insurance company can be construed as waiving any privilege if it has shared

its counsel's documents with a reinsurer when the parties' interests are not aligned. *AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052, 2008 WL 5062030, at *7 (S.D.N.Y. November 25, 2008); *see also Bull Data*, 152 F.R.D. at 139 (material that is otherwise privileged is discoverable if it has been disclosed to a third party).

The relevant parties' interests here were not and are not aligned. Rather, defendant engaged in two contested arbitrations with the reinsurers. Not only are otherwise-applicable privileges construed as waived, but defendant's contention that the court should invoke the common interest doctrine is rejected. This doctrine permits counsel for clients facing a common litigation opponent to exchange privileged documents and information, including attorney work product, in order to adequately prepare a defense without waiving any privilege. *Id.* (citation omitted). Because the parties' interests were not and are not aligned, the court rejects that the common interest doctrine applies in this action.

CONCLUSION

Defendant (and the reinsurer third parties) failed to meet the burden of establishing that specific prejudice or harm would result in the absence of the protective orders requested. There has been no threshold showing of appropriate circumstances warranting such protection. Accordingly, defendant's Motion For a Protective Order Concerning Subpoenas to Defendant's Reinsurers [142], as well as related motions from third party reinsurers Munich [157], Swiss [163], and Munich's counsel Rubin Fiorella & Friedman [160] are DENIED. The parties shall cooperate in good faith to fulfill plaintiffs' outstanding discovery requests. Any future dispute will be resolved without

oral argument, and an award of fees and costs will be considered.

IT IS SO ORDERED.

Dated this 1 day of May, 2009.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: 07/02/2010]

No. 10-70530
D.C. No. 3:07-cv-01337-HA
District of Oregon, Portland

In re: TIG SPECIALTY INSURANCE COMPANY.

TIG SPECIALTY INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
Respondent,

REGENCE GROUP, a.k.a. The Regence Group; et al.,
Real Parties in Interest.

ORDER

Before: LEAVY, RAWLINSON and CALLAHAN, *Circuit Judges*.

Petitioner's motion for reconsideration or alternatively, panel rehearing, is denied. *See* 9th Cir. R. 27-10. Petitioner's request for rehearing en banc is construed as a motion for reconsideration en banc, and it is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

Supreme Court, U.S.
FILED
NOV 3 - 2010
OFFICE OF THE CLERK

No. 10-450

In the Supreme Court of the United States

In re TIG Specialty Insurance Company,
Petitioner,

v.

U.S. District Court for the District of Oregon
Respondent.

The Regence Group, Regence BlueShield, Regence BlueCross BlueShield of Oregon, Regence BlueShield of Idaho, and Regence BlueCross BlueShield of Utah
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI AND/OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly denied mandamus relief to petitioner in connection with the district court's factual determination that any purported privilege that may have applied to documents was waived when petitioner disclosed the documents to opponents in adversarial arbitration proceedings?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondents/Real Parties in Interest Regence BlueShield, Regence BlueCross BlueShield of Oregon, Regence BlueShield of Idaho, and Regence BlueCross BlueShield of Utah state that they are nonprofit corporations in Washington, Oregon, Idaho, and Utah, respectively. The sole member of each is respondent the Regence Group, a non-profit, non-insurer holding company organized under the laws of the state of Oregon. None of respondents issue publicly-traded stock.

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OPINIONS BELOW

In addition to the opinions set forth in the petition (Pet. 1), the District Court's February 4, 2010 order denying reconsideration of petitioner's request for a protective order may be accessed at *Regence Group v. TIG Specialty Ins. Co.*, 2010 U.S. Dist. LEXIS 9840 (D. Or. Feb. 4, 2010).

COUNTERSTATEMENT OF THE CASE

A. The Instant Lawsuit and Petitioner's Refusal to Provide Insurance Coverage to Respondents

This case involves a dispute over insurance coverage. CA9 App. 233. Respondents sued petitioner for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, fraud in the inducement, and bad faith. Respondents seek, among other things, a declaration that petitioner is obligated to pay defense and indemnity costs related to three lawsuits (two in Florida, one in Washington state) in which respondents were named as defendants.[1]

The Florida lawsuits asserted RICO claims. The Washington lawsuit alleged similar claims under state law. One lawsuit (*Thomas*) has settled, and the other two were dismissed.

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[1] The underlying actions are *Tacoma Orthopaedic Surgeons, et al. v. Regence BlueShield, et al.*, No. 02 2 05982 7 (Wash. Super. filed Mar. 22, 2002); *Thomas, et al. v. BlueCross and BlueShield Ass'n*, 03-21296 (S.D. Fla. filed May 22, 2003) ("*Thomas*"); and *Solomon v. BlueCross and Blue Shield Ass'n*, No. 03-22935 (S.D. Fla. filed Dec. 2003).

Respondents purchased "Managed Care Organization Liability" insurance from petitioner. As part of the coverage, petitioner sold respondents coverage for RICO claims, and charged respondents an extra premium for the coverage.

When the first lawsuit (Washington) was filed, petitioner agreed to provide full coverage to respondents without reservation. *See Regence Group v. TIG Specialty Ins. Co.*, 2008 U.S. Dist. LEXIS 62731 at *5 (D. Or. Aug. 12, 2008). After the other two lawsuits were filed, petitioner refused to provide full coverage. *See id.*

Respondents filed suit in 2004 to obtain full coverage. The suit settled shortly thereafter. *See id.* In 2007, petitioner refused to cover, among other things, the settlement in *Thomas*. Respondents filed this action later that year.

B. Petitioner and Its Reinsurers Disputed the Existence of Reinsurance Coverage for Respondents' Claims

Petitioner purchased separate reinsurance policies from Swiss Reinsurance America Corporation ("Swiss Re"), and Munich Reinsurance America, Inc., f/k/a American Re-Insurance Company ("Munich Re") for claims made, *inter alia*, under the insurance policy sold to respondents. While the three underlying lawsuits were pending, petitioner submitted claims to its reinsurers seeking reimbursement for sums petitioner spent and would spend responding to the claims.

The reinsurers initiated two separate arbitration proceedings against petitioner to resolve the disputes regarding whether its reinsurance

policies covered a number of different claims. The three lawsuits against respondents were among those at issue in the arbitrations. CA9 App. 233.

Petitioner repeatedly attempts to downplay the adversarial nature of the arbitrations. *E.g.*, Pet. 3, 4, 10, 11, 14-15, 25. However, petitioner candidly acknowledges the "disputes" (*id.* at 10) and "disagreement" (*id.* at 12) between it and its reinsurers. Petitioner states without any citation that the arbitrations were about allocation of coverage. *Id.* at 10, 11, 12. The reinsurance arbitrations were about, among other things, the reinsurers' position that their policies did not cover respondents' claims.

Ultimately petitioner and its reinsurers settled their disputes that included petitioner's claims for coverage for the actions against respondents, and the reinsurers paid petitioner sums in settlement. *See* Dist. Ct. Doc. 189 at 10; Dist. Ct. Doc. 260 at 9-10; Dist. Ct. Doc. 263 at 9-10.

C. Respondents Sought Discovery of Information Exchanged With the Reinsurers

In the course of this litigation, respondents served document requests on petitioner seeking, among other things, communications with reinsurers about coverage for the lawsuits asserted against respondents. CA9 App. 233-34. Petitioner objected and refused to produce any reinsurance agreements, any communication with the reinsurers, or any reinsurance documents at all. CA9 App. 145, ¶5.

Respondents also served subpoenas on Swiss Re, Munich Re, and the law firm that represented

petitioner in both arbitrations, Rubin, Fiorella & Friedman. CA9 App. at 234. Those parties refused to produce any reinsurance documents. The reinsurers claimed the documents were protected by confidentiality orders or agreements in the reinsurance arbitrations (*id.* 145-46, ¶8), even though those orders or agreements expressly allowed disclosure of materials in response to subpoenas. Dist. Ct. Doc. 186 at 6, n.9.

While negotiations about the subpoenas were ongoing (in which petitioner participated), petitioner filed a motion in the district court seeking a protective order with respect to the information respondents sought. The third parties likewise filed motions resisting disclosure.

Of the three privilege logs that petitioner produced at the time of the briefing in the district court, petitioner referred to reinsurance with respect to only 30 documents. Dist. Ct. Doc. 151 at 8.[2] All 30 documents were withheld as "Confidential Proprietary Business Information" and 24 were also withheld on the basis of attorney/client privilege. *Id.* Petitioner did not list a single document as withheld on the basis of work-product privilege. *Id.*

Respondents contended that the subpoenaed information was reasonably calculated to lead to the discovery of admissible evidence for multiple reasons. For example, the requested documents were related to positions petitioner took with its reinsurers in the ordinary course of business and in

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[2] Petitioner later supplemented its logs after the briefing in the district court was complete.

arbitrations to secure payments for respondents' claims.

In the arbitrations, petitioner necessarily asserted that respondents' claims were valid, covered claims that petitioner ultimately would be required to have to pay. In other words, at the same time petitioner was telling respondents there was no coverage for their claims, petitioner was asserting to its reinsurers that its policy in fact covered respondents' claims. For this reason, the documents were particularly relevant to respondents' breach of contract and bad faith claims in the instant action.

Moreover, petitioner did not dispute that its settlement with the reinsurers included payments that partially represented recovery for respondents' claims under the policy. Dist. Ct. Doc. 151 at 5. Information regarding reimbursement received by petitioner in order to pay respondents' claims for coverage is clearly reasonably calculated to the discovery of admissible evidence in respondents' lawsuit against petitioner.

Respondents also have alleged counts for fraudulent misrepresentations and fraud in the inducement based on petitioner's denial of coverage for RICO claims, even though petitioner amended the policy and sold respondents coverage for RICO claims at an extra premium. Information petitioner conveyed to the reinsurers about RICO coverage is undoubtedly relevant to these issues.

Finally, reinsurance information may demonstrate petitioner's financial motive to act in bad faith in connection with respondents' claims for coverage. Based upon annual reports from petitioner's corporate parent, petitioner appeared to

be in financial distress at the time it refused to provide full coverage for respondents' claims. Such distress was apparent in part because petitioner was in runoff as of 2002 and, by December 31, 2004, already had submitted reinsurance claims equal to the $1 billion in "corporate insurance cover" the petitioner's parent had purchased from Swiss Re. It appears that various reinsurance commutations, including commutation of the $1 billion cover from Swiss Re were given to petitioner in order to improve petitioner's cash flow and balance sheet.[3] Such evidence of secret cash flow stresses (hidden by more optimistic financial reports which later had to be restated), caused in part by inadequate reserving of claims such as respondents', would tend to prove that petitioner had an incentive to deny or delay paying respondent's valid claims for insurance for improper reasons.

D. The Lower Court Decisions

In denying petitioner's (and its reinsurers) requests for protective orders, the district court agreed that the information sought by respondents was discoverable:

> Such discovery, limited in scope as described by Regence, is undoubtedly relevant or likely to lead to admissible evidence[.] . . . For example, the discovery might lead to evidence that could include admissions, be used for impeachment purposes on the question of whether defendant denied the existence of coverage, or pertain to [respondents'] fraud claims, motives that might suggest the

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[3] Excerpts from the reports are at Dist. Ct. Doc. 152, Ex. M.

> defendant acted in bad faith, and flaws in defendant's asserted defenses.

Pet. App. 23a.

Contrary to the repeated insinuations in the petition (*e.g.*, Pet 2, 3, 11), the district court never decided that any material was privileged—let alone under the work product doctrine. Instead, the district court held that *if* any privilege existed, it had been waived because the information had been disclosed in the adversarial arbitration proceedings. *See* Pet. App. 23a-24a.[4]

The district court subsequently denied reconsideration because petitioner's "motion provides no basis for altering the court's conclusion that the scope of the discovery is reasonable and proper." *Id.* at 10a-11a. The district court reiterated its prior conclusion—even if any privilege existed, it was waived by disclosure in the arbitrations. *Id.* at 10a. The district court further noted that respondents "have demonstrated consistent willingness to abide by confidentiality requests and to agree to reasonable protective orders. [Petitioner's] renewed concerns about confidentiality is [sic] no basis for delaying the production of non-privileged discovery or refusing to negotiate appropriate protective orders with opposing counsel in good faith." *Id.* at 12a.

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[4] After the district court in this case ordered production of the material at issue, the reinsurers initiated proceedings in the United States District Courts for the Southern District of New York and New Jersey seeking to quash the subpoenas issued in this case. The district court has sanctioned the reinsurers and awarded fees to respondents for these collateral attacks on its orders. *See* Dist. Ct. Doc. 473.

Petitioner filed a petition for a writ of mandamus in the court of appeals, which denied the petition without substantive comment, and without calling for a response from respondents. *Id.* at 1a. The Ninth Circuit denied petitioner's request for rehearing and rehearing en banc again without substantive comment, and again without calling for a response from respondents. *Id.* at 26a.

In the meantime, petitioner sought a stay of discovery from the district court while it exhausted its appellate remedies including to this Court. The district court denied the stay, and ordered petitioner to produce the relevant documents by October 15, 2010. Dist. Ct. Doc. 475. Petitioners moved for reconsideration of the denial of the stay. On October 15, 2010, petitioner produced certain material previously withheld and claims to have produced all of the documents that are subject to this petition. Petitioner's motion for reconsideration is still pending in the district court.

REASONS FOR DENYING THE PETITION

The decision below presents no issue warranting interlocutory review by this Court. In response to the district court's order, petitioner claims to have produced all of the material at issue. Therefore, the portion of the petition that seeks to prevent disclosure is moot. If petitioner wishes, it can seek its appellate remedies after final judgment.

A plethora of additional infirmities render this case especially unsuitable for this Court's review at this procedural juncture of the case. The district court did not determine that the material at issue was protected by the work product doctrine. Rather, the district court stated that if material was

protected, any privilege was waived. This Court will not review issues premised upon hypothetical underpinnings.

If any privilege existed here, the Ninth Circuit applied settled principles of law to the particular facts of this case. To the extent the work product doctrine applies, this case involves the very specific situation of a party disclosing purportedly confidential information to opponents in adversarial proceedings. The result does not conflict with any decision of this Court or of any other federal appellate court. There is no merit to petitioner's contentions that the decision below is contrary to the great weight of authority, or has created a conflict among the federal appellate courts. No decision cited in the petition even remotely suggests disharmony with the lower courts in such circumstances.

Finally, petitioner has abandoned any claim for mandamus relief by not providing any substantive discussion as to why it is entitled to the writ in its petition.

I. THE POSTURE OF THE CASE MAKES IT UNSUITABLE FOR THIS COURT'S REVIEW

A. The Petition is Interlocutory

The petition seeks review of an interlocutory order. This Court has traditionally preferred to "await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.,

respecting the denial of certiorari).[5] Not only does this policy promote judicial economy by discouraging piecemeal litigation, but it also ensures that this Court will decide real issues in concrete settings. *See Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting the denial of certiorari) (because this Court "reviews judgments, not opinions," it should "await a final judgment on a program genuinely in controversy").

The petition barely acknowledges the interlocutory posture of the case. Rather, it attempts to turn the Court's historical reluctance to review interlocutory orders on its head by contending that the interlocutory nature of this appeal somehow *favors* review at this juncture. *See* Pet. 24 n.9 (citing *Mohawk Indus. Inc. v. Carpenter*, 130 S.Ct. 599 (2009)). Contrary to petitioner's assertions, *Mohawk* unquestionably affirmed this Court's preference to review final judgments, as opposed to interlocutory orders.

Mohawk involved a substantially similar procedural posture. In *Mohawk*, the respondent filed a complaint against his employer (the petitioner) alleging civil rights violations. The petitioner had already been sued by a class of undocumented workers for labor and racketeering violations. *See*

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[5] *See also DTD Enters. v. Wells*, 130 S. Ct. 7, 8 (2009) (Kennedy, J. joined by Roberts, C.J., and Sotomayor, J.) (concurring in denial of certiorari because "the petition is interlocutory"); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Am. Constr. Co. v. Jacksonville, T. & K. W.R. Co.*, 148 U.S. 372, 384 (1893). The interlocutory nature of the order below "alone furnishes sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

130 S.Ct. at 603. When the lawyers for the class became aware of respondent's lawsuit, they sought an evidentiary hearing to explore the merits of respondent's claims. *Id.* At that hearing, petitioner contended that, upon investigating respondent's allegations by company counsel, the allegations were deemed completely false and without merit. *Id.* at 603-04.

Meanwhile, the *Mohawk* respondent sought discovery in his own lawsuit regarding the company's investigation of his claims. *Id.* at 604. Much like petitioner here, the *Mohawk* petitioner contended that such evidence was protected by the attorney-client privilege. Just like the district court in this case, the district court in *Mohawk* held that any privilege was waived when petitioner revealed the substance of the communications in the class lawsuit, and ordered production. *See id.* The Eleventh Circuit dismissed the appeal as an improper collateral appeal, and denied the alternative request for mandamus relief. *See id.*

This Court granted certiorari to resolve a circuit conflict "concerning the availability of collateral appeals in the attorney-client privilege context." *Id.* The Court determined that waiting until final judgment to review discovery orders rejecting assertions of attorney-client privilege does not "imperil[] the interest [of confidentiality] as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at 606. In so holding, this Court considered and rejected the same essential argument that petitioner makes here:

> In our estimation, postjudgment appeals generally suffice to protect the rights of

> litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.
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> Dismissing such relief as inadequate, Mohawk emphasizes that the attorney-client privilege does not merely "prohibi[t] use of protected information at trial"; it provides a "right not to disclose the privileged information in the first place." [cit.] Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.

Id. at 606-07. The same principles that this Court held applicable to the attorney-client privilege should also apply to the qualified work product doctrine. *Cf. In re Impounded Case (Law Firm)*, 879 F.2d 1215, 1213-14 (3d Cir. 1989) (same legal principles generally apply to both the attorney client privilege and the work product doctrine).

Also, as discussed *supra* at 8, petitioner claims to have produced the material at issue on October 15, 2010 in response to an order by the district court. Although this Court has held that compliance with an order to produce documents does not necessarily moot a pending appeal challenging discovery because the higher court can order that the produced

documents returned and any copies destroyed (*Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)), petitioners do not request such relief from this Court, nor have they requested it from the district court. Rather, petitioner seeks an interlocutory order to prevent disclosure. *E.g.*, Pet. 13-14, 21-26. Since that particular relief is no longer available, the claimed grievance cannot be remedied, and the petition is moot. *Cf. United States v. Miller*, 14 F.3d 761, 764 (2d Cir. 1994) ("[T]he 'cat is out of the bag' so to speak, and there is no way the trial court or this Court can put it back in"). If petitioner wishes, it can seek review of the underlying issue (*i.e.*, whether disclosure was proper) on appeal from a final judgment. *See Mohawk*, 130 S.Ct. at 606-07.

B. Additional Infirmities Render this Case Unsuitable for This Court's Review

The factual record in this case offers a fitting example of why the rejection of interlocutory review is exactly correct. Courts routinely compel production of reinsurance information in insurance coverage litigation.[6] In discovery disputes, the party

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[6] For a sampling of such cases, *see, e.g.*, *Kingsway Fin. Servs. v. Pricewaterhouse-Coopers LLP*, 2008 U.S. Dist. LEXIS 77018, at *12 (S.D.N.Y. Oct. 2, 2008); *Reliance Ins. Co. v. Am. Lintex Corp.*, 2001 U.S. Dist. LEXIS 7140, at **10-11 (S.D.N.Y. June 1, 2001) ("While their commercial interests coincide, to some extent, no evidence has been proffered that establishes that Reliance and its reinsurer share the same counsel or coordinate legal strategy in any way"); *Young v. Liberty Mut. Ins. Co.*, 1999 WL 301688 at *1, *7 (D. Conn. Feb. 16, 1999); *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 258 (W.D. Va. 1999); (rejecting objections based on common interest doctrine); *McLean v. Cont. Cas. Co.*, 1996 WL 684209 at *1 (S.D.N.Y. Nov. 21, 1996) (same); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 139-42 (N.D. Ill. 1993) (rejecting objections based on attorney client and work product doctrine); *Am.*

asserting work product protection has the burden of establishing that work product applies. *See, e.g., Springwell Corp. v. Falcon Drilling Co.*, 1998 U.S. Dist. LEXIS 19455, at *2 (S.D.N.Y. June 30, 1998) (Sotomayor, J.). In this case, many of the documents sought (*e.g.*, ordinary claims documents, the reinsurance policies, submissions in the arbitrations, and notices to reinsurers) simply are not privileged at all—let alone protected by the work product doctrine. Rather, these documents were prepared in the ordinary course of business and, therefore, do not come within the work product doctrine. *See, e.g., Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (citing numerous authorities).

More importantly, the petition's underlying premise—that some subset of the information at issue is protected by the work product doctrine—is entirely hypothetical.[7] The district court *assumed* that if any documents were protected by the qualified

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Colloid Co. v. Old Republic Ins. Co., 1993 WL 222678 at *1-3 (N.D. Ill. June 21, 1993); *Stonewall Ins. Co. v. Nat'l Gypsum Co.*, 1988 WL 96159 at **5-6 (S.D.N.Y. Sept. 6, 1988); *Nat'l U. Fire Ins. Co. v. Cont. Ill. Corp.*, 116 F.R.D. 78, 83-85 (N.D. Ill. 1987); *Am. Protection Ins. Co. v. MGM Grand Hotel-Las Vegas*, 1983 U.S. Dist. LEXIS 16423, at **15-16 (D. Nev. June 7, 1983) (rejecting objections based on attorney client and work product doctrine); *Mass. Bay Ins. Co. v. Stamm*, 700 N.Y.S.2d 707, 708 (App. Div. 2000) (same and citing additional authorities); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1099, 1107-08 (Del. Super. 1991) (citing additional authorities); *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 768 (Ohio C.P. 1993). These decisions belie the overblown apocalyptic concerns proferred by petitioner and the opinions of private practitioners who regularly represent insurance and reinsurance companies. Pet. 20-25.

[7] Petitioner does not dispute that the information sought by respondents is relevant. *See supra* at 4-6.

work product doctrine, the privilege was waived. The court did not decide whether the documents were actually subject to the work product doctrine. Pet. 10a, 23a-24a. This Court will not review questions that are premised upon hypothetical underpinnings. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S., 117, 122 (1994); *Conway v. Cal. Adult Author.*, 396 U.S. 107, 110 (1969). Had the district court addressed the issue of whether specific documents were subject to the work product doctrine, it very likely would have resolved the question in the negative.

Underscoring the dubious proposition that any material was protected by work product, petitioner never claimed work product protection in its privilege logs in connection with any entry mentioning reinsurance until *after* briefing in the district court was closed. *See supra* at 7. A failure to assert a privilege in a log generally waives any claim to that privilege. *See, e.g., John B. v. Goetz*, 2010 U.S. Dist. LEXIS 8821, at **271-72 (M.D. Tenn. Jan. 28, 2010) (citing numerous decisions); *In re Honeywell Int'l Secs. Litig.*, 230 F.R.D. 293, 299 (S.D.N.Y. 2003) (same).

The "common interest" doctrine also is inapplicable due to petitioner's failure to establish a work product basis for withholding the documents. That privilege only applies when the material was already protected by some other privilege. *See, e.g., Cavallaro v. United States*, 284 F.3d 236, 249-50 (1st Cir. 2002). Because petitioner never established that the work product doctrine applies in the district court, the common interest doctrine is entirely irrelevant here. *See, e.g., Front Royal*, 187 F.R.D. at 258; *Allendale*, 152 F.R.D. at 140-41.

Finally, petitioner did not argue to the Ninth Circuit the question presented to this Court. Here, petitioner contends that it did not waive work product protections when it "shares such materials with a reinsurer with which it has a substantial but not a perfect alignment of interests." Pet. i. Yet in its "issues presented" to the Ninth Circuit, petitioner argued no waiver because it disclosed the materials "to its reinsurers as part of its normal course of business" and "in response to an order compelling it to do so as part of a confidential reinsurance arbitration." TIG's Ninth Circuit Petition at 10. This Court ordinarily does not decide questions that were not presented below. *See, e.g., Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 168 (2004). There is no reason to do so here.

II. THE LOWER COURT CORRECTLY APPLIED SETTLED PRINICIPLES IN ORDERING DISCLOSURE OF THE MATERIALS AT ISSUE

A. Any Privilege or Protection Has Been Waived

In this case, the district court held that any applicable privilege was waived, and petitioner still fails to show that the lower court's decision was erroneous. Work product protection "is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles,* 422 U.S. 225, 239 (1975). Disclosure of otherwise privileged information to an adverse party waives any claim of privilege. *See id.*; *see also* 8 Wright, Miller, & Marcus, FEDERAL PRACTICE & PROCEDURE *Civil* (3d) § 2024 at 530 (2010).

Generally speaking, disclosure to an opponent in an adversarial proceeding waives any work product privilege in future lawsuits against another party, even if such documents were subject to a confidentiality and protective order providing that the production of such documents would not constitute a waiver of any privilege or protection. *See, e.g., Navajo Nation v. Peabody Holding Co.*, 209 F. Supp.2d 269, 286-88 (D.D.C. 2002) (citing *Hickman v. Taylor*, 329 U.S. 495, 509-12 (1947)).[8] As the United States Court of Appeals for the District of Columbia Circuit put it, "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

Such is precisely the case here. Petitioner claims that it shared purportedly protected materials with its reinsurers to ostensibly evaluate whether respondents' claims were covered after the reinsurers initiated arbitration proceedings denying any coverage existed. Yet petitioner has improperly "resurrected the claim of confidentiality" against

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[8] *See also Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (rejecting argument that disclosures made pursuant to a confidentiality agreement immunizes against waiver); *In re Chrysler Motors Corp. Overnight Evaluation*, 860 F.2d 844, 846-47 (8th Cir. 1988) (same); *Griffith v. Davis*, 161 F.R.D. 687, 699-700 (C.D. Cal. 1995) ("waiver occurs despite any agreement by the parties that the information disclosed will remain confidential as against the rest of the world").

respondents in the instant lawsuit over the same materials.

Arbitration proceedings are inherently adversarial. *See, e.g., Omaha v. Omaha Water Co.*, 218 U.S. 180, 195 (1910); *Austin Mun. Secs., Inc., v. Nat'l Assoc. of Secs. Dealers, Inc.*, 757 F.2d 676, 691 (5th Cir. 1985); *Harter v. Iowa Grain Co.*, 1998 U.S. Dist. LEXIS 22855, at **4-5 (D.D.C. May 12, 1998), *vacated as moot on other grounds*, 1998 U.S. App. LEXIS 28491 (D.C. Cir. Oct. 28, 1998).[9] This case presents no exception. Petitioner and its reinsurers plainly took conflicting and opposing positions as to whether coverage existed for the claims at issue. Petitioner repeatedly attempts to downplay the adversarial nature of the arbitrations. *E.g.*, Pet. 3, 4, 10, 11, 14-15, 25. Without citation, petitioner asserts that the arbitrations were solely about allocation. *Id.* at 10, 11, 12. However, petitioner candidly acknowledges the "disputes" (*id.* at 10) and "disagreement" (*id.* at 12) between itself and its reinsurers regarding coverage, and the petition's question presented acknowledges adversity existed

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[9] *See also* Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOTIATION L. REV. 287, 296 (2005) ("Arbitration is an adversarial procedure in which an independent third party decides the case"); C. Edward Fletcher, ARBITRATING SECURITIES DISPUTES (1990) at 848-49 ("Much like litigation, arbitration is characterized by trial-like adversarial confrontation, but it is conducted privately and employs more relaxed rules of evidence and procedure than litigation"); Note, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 856 (2005) (rejecting analogy between arbitration and settlement as "unsatisfactory, because arbitration results in a third-party decision after an adversarial process").

between the entities. *Id.* at i. The mere fact that *some* common interest among the parties exists is not sufficient to prevent waiver when otherwise confidential information is disclosed to an adversary. *See, e.g., Chrysler Motors Corp,* 860 F.2d at 846-47 (court held work product protection of computer tape produced during settlement negotiation was waived; rejecting contention that pursuit of settlement was a common interest between parties).

Although petitioner claims (Pet. 10) that it was "ordered" to share certain privileged documents with the reinsurers in the arbitration proceedings, the trial court correctly noted that the documents petitioner sought to protect from disclosure also were exchanged with the reinsurers in the ordinary course of business. Pet. App. 8a.[10] Based upon settled principles governing waiver, the lower court also correctly determined that petitioner waived any claim of privilege when it disclosed the relevant information in adversarial arbitration proceedings against its reinsurers.

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[10] Further, to the extent that petitioner asserts the arbitration panels' orders amounted to "compulsion" for disclosure, they were simply a façade manufactured by petitioner to guard against any disclosure in future litigation. *See* Dist. Ct. Doc. 186 at 2, 6. Even if petitioner's disclosures were truly involuntary and made under threat of sanction (which they were not), such would be a factual determination ill-suited for resolution by this Court. *See, e.g., Nobles,* 422 U.S. at 240 n.14 (waiver of work product "depends, of course, on the circumstances"); *In re Grand Jury (Impounded),* 138 F.3d 978, 980-81 (3d Cir. 1998) (waiver of work product reviewed for abuse of discretion); *In re Outsidewall Tire Litig.,* 267 F.R.D. 466, 470 (E.D. Va. 2010) (noting that "most discovery disputes" are of "fact-specific character" and entrusted to the discretion of the trial judge).

B. Petitioner's Reliance on Federal District Court Cases is Unavailing

In support of its dubious assertion (Pet. 15) that a "majority of courts" hold that an insurer and reinsurer do not waive any common interest privileges by sharing information, petitioner cites four district court decisions purporting to support its position. *See id.* at 16-17; *but see supra* at 13 n.5 (citing authorities rejecting privilege claims). A critical issue is whether adversity exists. Adversity is present when insurer and reinsurer institute arbitration proceedings taking opposite positions as to whether coverage exists. *See, e.g., AIU Ins. Co. v. TIG Ins. Co.* 2008 U.S. Dist. LEXIS 96693, at **21-23 (S.D.N.Y. Nov. 25, 2008) (holding that insurer and reinsurer became adversaries when underlying litigation had settled and insurer and reinsurer had to resolve coverage payments between themselves);[11] *North River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, at **4-5 (S.D.N.Y. Jan. 5, 1995).

The district court cases cited by petitioner (Pet. 16-18) that denied discovery of reinsurance information did not involve situations where (as here) the insurer and reinsurer were adversarial.

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[11] The *AIU v. TIG* case involved another dispute between petitioner and a reinsurer. Petitioner sought production of documents from its reinsurer even though the latter claimed the documents were privileged. Petitioner made—and prevailed with—several arguments that are directly contrary to the positions petitioner is asserting to this Court. *See id.* (petitioner arguing that confidentiality agreement did not preclude disclosure and that it did not have a common interest with its reinsurer). Thus, petitioner's assertions that insurers and reinsurers inherently share coterminous interests (*e.g.*, Pet. 5-7, 21-26) should be viewed with a skeptical eye.

See, e.g., Minn. Sch. Bd. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (no adversary proceeding between the insurer and its reinsurers); *City of Sterling Heights v. United Nat'l Ins. Co.*, 2005 WL 5955828, at *1 (E.D. Mich. June 30, 2005) (same); *Employer Reinsurance Corp. v. Laurier Indem. Co.*, 2006 WL 532113 at *2 (M.D. Fla. Mar. 3, 2006) (same); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 1989 WL 82415, at *3 (S.D.N.Y. July 20, 1989) (same). Those cases are thus distinguishable.

Moreover, even petitioner's authorities recognize the universal principle that any common interest privilege between insurer and reinsurer dissipates when their interests become adverse. *See Employer Reinsurance*, 2006 WL 532113 at *2 ("If those interests *actually* rather than hypothetically diverge at some point, Plaintiff can renew its motion [to compel]"). Undoubtedly, an arbitration contesting whether coverage exists presents a situation where a reinsurer and ceding insurer's interests "diverge."

III. NO SPLIT EXISTS AMONG THE FEDERAL APPELLATE COURTS

Petitioner is mistaken when it contends that the Ninth Circuit's denial of mandamus conflicts with the decisions of other federal appellate courts.[12]

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[12] Although petitioner's briefs to the district court and Ninth Circuit cited some of the district court opinions that it cites to this Court, those briefs did not cite any of the federal appellate decisions relied upon in the petition to support a "conflict."

A. Evidentiary Rulings from the Temporary Emergency Court of Appeals are Not Binding Upon Any Court

The most repeatedly-cited federal appellate decision in the petition (*United States v. Gulf Oil Corporation*, 760 F.2d 292 (TECA 1985)) cannot serve as a basis for a circuit split. *See* Pet. 3, 18, 19, 21. While the Federal Circuit adopted the decisions of the Temporary Emergency Court of Appeals as precedent after TECA was abolished by Congress (*see Tex. Am. Oil Corp. v. D.O.E.*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc)), it only did so with respect to substantive energy law. *See, e.g., Marriott Int'l Resorts, L.P. v. United States*, 61 Fed. Cl. 411, 418 (2004) (declining to follow TECA precedent in non-energy cases), *rev'd on other grounds*, 437 F.3d 1302 (Fed. Cir. 2006). To the extent that TECA decisions involve procedural or evidentiary rulings, those decisions are not binding on the Federal Circuit—or on any court. *See id.*[13] No Federal Circuit decision has treated TECA's decisions as binding outside of the energy context. Accordingly, *Gulf Oil* does not support petitioner's effort to manufacture a "circuit split."

[13] *See also Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 496 n.25 (2005) ("TECA's rulings on evidentiary privileges are not binding on this Court because the Federal Circuit adopted TECA decisions as precedent only in cases where the Federal Circuit was acting as a successor to TECA"), *aff'd in part, rev'd in part, vacated in part on other grounds*, 598 F.3d 1372 (Fed. Cir. 2010).

B. The Other Circuit Court Decisions Cited by Petitioner Are Distinguishable Because They Did Not Involve Disclosure to an Adversary

There is no substance to petitioner's suggestion that the decision below conflicts with decisions of the Fourth and District of Columbia Circuits. *See* Pet. 18-19 (citing *In re Grand Jury Subpoenas, 89-3 & 89-4*, 902 F.2d 244 (4th Cir. 1990) and *United States v. AT&T*, 642 F.2d 1285 (D.C. Cir. 1980)).

The Fourth Circuit's decision in *Grand Jury Subpoenas* involved an attempt by the government to obtain materials from a wholly-owned subsidiary of a company that allegedly committed the crime of misappropriating proprietary information while performing a contract for the United States Army. *See* 902 F.2d at 245-46. The government contended that the subsidiary had shared the relevant materials with its parent during earlier civil proceedings brought by the corporate parent against the Army for equitable adjustments to the contract. The Fourth Circuit made clear that no privilege had been waived because, at the time, the parent and subsidiary had a common interest in prevailing in the civil action against the Army and that their interests were never antagonistic. *See id.* at 249.

Nothing in the Fourth Circuit's decision even remotely suggests a conflict here. Consistent with the decision below, earlier precedent from the Fourth Circuit has held that any claim of privilege is waived if a party discloses otherwise privileged information to parties with adverse interests. *See In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981). Indeed, the Seventh

Circuit has distinguished the Fourth Circuit's decision in *Grand Jury Subpoena* specifically on the basis that it involved parties who were pursuing a joint, nonadversarial interest at the time of the disclosures. *See United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997).

The District of Columbia Circuit's decision in *AT&T* is likewise of no avail to petitioner. That case involved two separate lawsuits by the government and MCI against AT&T. At no point were the government's and MCI's interests ever antagonistic. Hence, there was no waiver of privilege. *See* 642 F.2d at 1300.

The situation in *AT&T* is not even remotely factually analogous to the instant situation. Indeed, some courts have cited the District of Columbia Circuit's *AT&T* decision in holding that information shared by insurers and reinsurers is not protected by any privilege. *See, e.g., Am. Protection*, 1983 U.S. Dist. LEXIS 16423, at **15-16 (insurer waived privilege by sharing information with reinsurer; *citing AT&T*).

Likewise, even if the TECA's decision in *Gulf Oil* were binding upon any court (and it is not), it is distinguishable here for the same reasons. *Gulf Oil* involved two entities that shared documents when they were contemplating a corporate merger that ultimately proved unsuccessful. The TECA expressly predicated its decision that there was no waiver of work product on the fact that the parties in that case "were obviously not adversaries at the time of the disclosure." 760 F.2d at 296. Rather, the parties "were in the initial stages of becoming parent and subsidiary. Consequently, Gulf had a legitimate,

nonadversarial, interest in reviewing Cities' work product generated in connection with the declaratory judgment." *Id.* Here, petitioner and its reinsurers were clearly in adversarial proceedings.

IV. PETITIONER DOES NOT SUPPORT ITS CLAIM FOR MANDAMUS RELIEF WITH SUBSTANTIVE ARGUMENT

Although entitled "Petition for Writ of Certiorari And/Or Mandamus," the petition makes no substantive argument or even reference to a claim for mandamus relief. It makes no attempt to fulfill the substantive requirements of Rule 20, even though it is petitioner's burden to show that "its right to issuance of the writ is clear and indisputable." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quotation omitted). Moreover, the petition's conclusion makes no reference to mandamus relief. Pet. 27 ("this Court should grant the petition for a writ of certiorari"). By failing to provide any substantive argument for mandamus relief, petitioner abandoned the claim. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

Even if there was no waiver, petitioner would not be entitled to mandamus relief. "Mandamus is an extraordinary remedy, available only in rare cases." *Roberts v. United States Dist. Court*, 339 U.S. 844, 845 (1950) (per curiam). Only a "judicial usurpation of power will justify the invocation of" mandamus relief. *Will v. United States*, 389 U.S. 90, 95 (1967) (quotation omitted). The losing party's opinion that the decision below was erroneous does not satisfy this demanding standard. *Id.* at 98 n.6. The petitioner must also demonstrate that it has no

other adequate means to attain the desired relief. *Kerr v. United States*, 426 U.S. 394, 403 (1976).

For the same reasons discussed in *Mohawk*, petitioner cannot demonstrate that it meets the standards for mandamus. If petitioner feels aggrieved at the end of this lawsuit, it can pursue a direct appeal. *See* 130 S.Ct. at 606-07. The interlocutory review petitioner seeks is simply unwarranted.

CONCLUSION

The petition for a writ of certiorari and/or mandamus should be denied.

Respectfully submitted,

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